Supreme Court, U.S.
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NO.: 01-871

In The
Supreme Court of the United States

OCTOBER 2001 TERM

ORANGE McGHEE
Appellant,

v.

JOSEPH T. TISDALE AND
EMILY TISDALE,
Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

James E. Wilson, Jr.
732 Carter Hill Road
Montgomery, AL 36106
(334) 834-9899
Counsel Supreme
Court of Alabama

Solomon S. Seay, Jr.
P.O. Box 210998
Montgomery, AL 36121
(334) 274-0722

Counsel of Record

38 pp

QUESTION PRESENTED FOR REVIEW

Whether the joint nature of plaintiffs' claims against the defendants precluded the trial court from entering a liability determination against defaulting defendant Huffman until the issues have been adjudicated against defendant McGhee?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the courts below:

Plaintiffs

Joseph T. Tisdale
Emily Tisdale

Defendants

Henry Huffman
Orange McGhee

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OPINION BELOW

The order of the Circuit Court of Montgomery County, Alabama, the order of the Supreme Court of Alabama affirming the order of the Circuit Court, and the order of the Supreme Court of Alabama overruling the Application for Rehearing are contained in the Appendix following this Petition. APP. A1-6

JURISDICTION

The Circuit Court of Montgomery County, Alabama, entered an order against Defendant on June 20, 2000. The Supreme Court of Alabama affirmed the order of the Circuit Court on June 22, 2001. The Supreme Court of Alabama overruled defendant's Application for Rehearing on August 31, 2001. This Court has jurisdiction pursuant to 28 USC 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, 42 USC 3601 et seq., 42 USC 3602(b), 42 USC 3604a-e and 42 USC 1982. App. A7-12

STATEMENT OF THE CASE

Joseph T. and Emily Tisdale are Caucasians. Henry Huffman and Orange McGhee are Black. The Tisdales filed a complaint against Huffman and McGhee asserting, the Tisdales learned that Huffman was offering to sale 31.27 acres of real property and informed Huffman they desired to purchase the property; that Huffman orally agreed to sell the property to the Tisdales; that Huffman refused to consummate the sale because of the Tisdales race and subsequently sold the property to McGhee; that Huffman refusing to sale the land to the Tisdales was unlawful and is a violation of 42 USC 3601 et. seq. The Tisdales requested compensatory and punitive damages and an Order granting specific performance.

The Tisdales further alleged, that Huffman and McGhee conspired to deprive the Tisdales of their civil rights by agreeing to deprive the Tisdales of the sale of subject property in violation of 42 USC 3601 et seq.

The Tisdales further alleged, that Huffman and McGhee's action deprived them of equal protection under the law and violates 42 USC 1982.

McGhee filed a Motion To Dismiss asserting, the Tisdales first cause of action fails to state a claim against McGhee upon which relief can be granted; that 42 USC 3604(b) defines dwelling as... "any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof"; that McGhee was not the owner of the real property and therefore cannot be charged with violating 42 USC 3601.

McGhee further responded, the Tisdales' conspiracy

claim failed to state a claim upon which relief can be granted as the real property is not a dwelling as defined under 42 USC 3602(b); that the subject real property is rural farm property; that defendant Huffman had previously farmed the property and rented same for cattle farming; that Huffman did not offer or advertise the real property for sale for any particular purpose; that Huffman did not offer or advertise the real property for sale for the construction, or location of any building, structure, or proposed developments or projects; that the subject real property therefore is not a dwelling as defined under 42 USC 3602(b).

Attached to McGhee's Motion To Dismiss is the Affidavit of Huffman wherein he states:

> "I was the owner of 31.27 acres of real property located in Montgomery County, Alabama. I sold this property to Orange and Lula Mae McGhee on May 4, 1999. Prior to the sale of this property, I owned the property for many years. I had rented the property in the past for cattle farming. Many years ago, I did some farming on the property. I sold the property because I did not want to be bothered with it any more. I did not offer the property for sale for any particular purpose. I did not offer the property for sale for the construction or location of any building, structure or proposed developments or projects."

McGhee further responded, the Tisdales equal protection claim fails to state a claim upon which relief can be granted, as McGhee was not the owner of the real property and cannot be charged with violating 42 USC 1982.

Huffman failed to respond to the Tisdales' Complaint and the trial court entered a default judgement. The Tisdales filed a Motion For Final Judgement and For An Order Directing Specific Performance asserting, inter-alia,

> "that under plaintiff's federal claims, it is not necessary for McGhee to be found guilty of a discriminatory intent, or even for McGhee to be a party to this litigation; that the Tisdales will agree to dismiss their claims for money damages, court cost and attorney fees if specific performance is awarded; that although substantial direct and circumstantial evidence of McGhee's complicity exists to allow a case against him to proceed to a jury, the Tisdales will also agree to dismiss McGhee if an award of specific performance is provided; that all the court must find in order to grant specific performance is (1) liability be established against Huffman; and (2) that McGhee had actual notice of the lawsuit before the sale of the realty was consummated."

McGhee filed a Motion For Summary Judgement asserting, Huffman is exempt under 42 USC 3602(b) from any claim of discrimination in the sale of the subject real property in that Huffman never owned more than three such single family houses at any one time; and that the Tisdales failed to allege a prima facie case under 42 USC 1982 against McGhee.

Attached to McGhee's Motion For Summary Judgement is the Affidavit of Huffman wherein he states:

> "I was the owner of 31.27 acres of real property located in Montgomery County, Alabama. The property has a

house on it. No one has lived in the house for approximately 15 years. The house was made for a single family. I sold this ho se and real property to Orange and Lula Mae McGhee on May 4, 1999. The only other house that I own is the residence that I live in at 100 Mobile Road. I have never owned more than three single family houses at one time. I did not use in any manner, the sales of rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or person, in the sale of the house and real property to Orange and Lula Mae McGhee."

The trial court entered an order granting the Tisdales a final judgement and vesting title to the property to the Tisdales. The court rendered the Warranty Deed rendering the transfer of the property from Huffman to the McGhees null and void. The court further ordered the Tisdales to pay $30,000.00 to satisfy the mortgage held by Regions Bank and if any amount remains after satisfying the mortgage to pay such amount to Orange McGhee. App. A1-4

McGhee appealed the trial court's order to the Supreme Court of Alabama. In McGhee's brief submitted to the Supreme Court of Alabama, McGhee raised the issue, "whether the order of the court rendering the Warranty Deed from Huffman to McGhee null and void, denied McGhee Due Process of law and rendered the order void[1]. App. A13. The

[1] The Statement of Issue and Argument in McGhee's Brief in the Supreme Court of Alabama is appended to this Petition For Writ of Certiorari

Supreme Court of Alabama affirmed the order of the trial court and rendered "No Opinion" App. A5 The Supreme Court of Alabama subsequently denied McGhee"s Application for Rehearing. App. A6

ARGUMENT

THE JOINT NATURE OF PLAINTIFFS' CLAIMS AGAINST THE DEFENDANTS PRECLUDES THE TRIAL COURT FROM ENTERING A LIABILITY DETERMINATION AGAINST DEFAULTING DEFENDANT HUFFMAN UNTIL THE ISSUES HAVE BEEN ADJUDICATED AGAINST DEFENDANT MCGHEE.

Plaintiff's complaint clearly charges the defendants with joint liability. Indeed, Plaintiffs' second cause of action charges a conspiracy. The matters charged in the complaint determine the nature of the liability where multiple defendants are charged.

> " When a complaint makes a joint charge against two or more defendants as here, and one of the defendants fails to answer or otherwise appear in a case, judgement should not be entered against him until the matter has been adjudicated as to all defendants or all defendants have defaulted...At most, the court should enter a default against the defendant who has failed to appear and withhold the entry of judgment as to this defendant pending the outcome of the litigation involving the remaining defendant ..."Warrington

U.S.A. Inc. v. Allen 637 F. Supp 1456 (E.D. Wis. 1986)

In Frow v. De La Vega, 82 US 552, the plaintiff De La Vega had filed a complaint against fourteen defendants charging eight of them with a "joint conspiracy to defraud him" out of a piece of real property. One of those eight was Frow; he failed to file a timely answer, and the district court entered a pretrial default judgement against him. The case then went to trial, and the court decided the merits of the cause adversely to the complaint and dismissed the bill".

This court held;

> "the true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the Complainant on the merits, the bill will be dismissed as to all the defendants alike– the defaulter as well as the others. If it is decided in the Complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal. This was so expressly decided by the New York Court of Errors, in the case of Clason v. Morris. Spencer, J. says: It would be

> unreasonable to hold that because one defendant had made default the plaintiff should have a decree even against him, where the court is satisfied from the proofs offered by the other, that in fact the plaintiff is not entitled to a decree;"

See also Gulf Coast Fans Inc. v. Midwest Electronics Importers, Inc. 740 F. 2d 1499, 1511-12 (11th Cir. 1984) (reversing district court refusal to set aside default judgement in contract case and noting that under Frow plaintiff who failed to recover from one defendant because plaintiff had breached contract could not recover from a second defendant who had not defended the suit); Douglas v. Metro Rental Services, Inc. 827 F. 2d 252 (7th Cir. 1987) (affirming default judgement on the grounds defendant were not alleged to be jointly liable).

The decision of the Supreme Court of Alabama affirming the order of the trial court conflicts with decisions of United States Courts of Appeal and the Supreme Court of the United States. Clearly plaintiffs' complaint charges joint liability. The liability of McGhee (non defaulting party) was based on the liability of Huffman (defaulting party). The order denied McGhee the opportunity to defend the charges and is therefore inequitable and denied due process of law under the 14th Amendment to the United States Constitution.

/s/ _____
Solomon S. Seay, Jr.
P.O. Box 210998
Montgomery, AL 36121
(334) 274-0722
Counsel of Record

APPENDIX A

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

JOSEPH T. AND EMILY TISDALE,	)	
Plaintiffs	)	
vs.	)	CASE NO. CV-99-1307
HENRY HUFFMAN AND ORANGE MCGHEE,	)	
Defendants.	)	

ORDER

This matter came before the Court on Plaintiffs' motion seeking equitable relief in the form of a Final Judgement and Order vesting title to the property which serves as the basis of this lawsuit to the plaintiffs. After consideration of the legal argument presented in the pleadings, and after consideration of the arguments presented at the hearing on Plaintiffs' motion, Plaintiff's motion is GRANTED.

In accordance with Alabama Rule of Civil Procedure 70, this Court renders the Warranty Deed effectuating a transfer of property from defendant Henry Huffman to Orange McGhee and Lula Mae McGhee dated the 4th of May, 1999, null and

void (A copy of this Warranty Deed is attached as Exhibit 1). This Court further Orders and Decrees that Joe T. Tisdale, Jr., and Emily Tisdale, for and during their joint lives and upon the death of either of them, then to the survivor of them in fee simple, together with every contingent remainder and right of reversion, are granted the following described real estate, situated in the County of Montgomery, and the State of Alabama, to-wit:

> Parcel 1 Commence at a fence corner known as the Southeast Corner of Section 1, T-13-N, R-17-E, Montgomery County, Alabama (said point also being on the north side of Sprague Junction Road (a dirt road); thence along said north side of road North 86 deg. 55'06" West, 104.72' to an iron pin located on a fence line and point of beginning for the herein described parcel of land; thence along said fence line and north side of road the following three (3) courses: (1) South 88 deg. 56'06" West, 218.51' (2) North 88 deg. 37'01" West, 203.17' (3) South 89 deg. 35'18" West, 12.90' to a point; thence leaving said north side of road continue along said fence line the following five (5) courses; (1) North 86 deg. 57'41" West, 166.44' (2) North 87 deg. 52'44" West; 133.60' (3) South 82 deg. 31'10" West, 33.23' (4) North 76 deg. 31'26" West, 45.09' (5) North 86 deg. 36'27" West, 93.79' to an iron pin; thence along another fence line and apparent line of possession the following four (4) courses; (1) North 01 deg. 21'51" East, 184.80' (2) North 01 deg. 16'02" East, 414.22' (3) North 01 deg. 40'39" East, 314.19' (4) North 03 deg. 52'21" East, 520.42' to an iron pin; thence along another fence line and apparent line of possession the following two (2) courses: (1) South 81 deg. 50'20" East,

296.73' (2) South 81 deg. 02'51" East, 3.81' to an iron pin; thence continue along said fence line and apparent line of possession the following three (3) courses: (1) South 85 deg. 24'14" East, 278.57'; (2) North 89 deg. 39'18" East, 236.73'; (3) North 89 deg. 39'11" East, 134.59' to an iron pin; thence along another fence line and apparent line of possession the following seven (7) courses; (1) South 00 deg. 43'12" West, 222.45'; (2) South 03 deg. 15'26" West, 281.71'; (3) South 01 deg. 14'36" West, 171.07' (4) South 03 deg. 02.46" East, 234.61'; (5) South 04 deg. 09.25" East, 138.58'; (6) South 01 deg. 29.45", West 131.87'; (7) South 03 deg. 18'21" East, 112.39' to a fence corner thence leaving said fence line South 12 deg. 04'02" West, 6.50' to an iron pin; thence North 86 deg. 12'48" West, 23.57' to a point; thence North 83 deg. 39'51" West, 34.37' to a point; thence North 89 deg., 14'38" West, 40.49' to an iron pin; thence along a fence line South 01 deg. 48'04" West, 104.13' to the point of beginning. Containing 31.28 acres, more or less, and lying in and being a part of the East half of the SE 1/4 of Section 1, T-13-N, R-17-E, Montgomery County, Alabama.

This conveyance is made subject to all easements, restrictive covenants, reservations and rights of way appearing of record affecting the subject property.

TO HAVE AND TO HOLD to Joe T. Tisdale, Jr. and Emily Tisdale for and during their joint lives and upon the death of either of them, then to the survivor of them in fee simple, and to their heirs and assigns of such survivors forever, together with every contingent remainder and right of reversion.

This Court further Orders the Plaintiffs, Joe T. Tisdale, Jr. and Emily Tisdale, to pay the sum of Thirty Thousand Dollars ($30,000.00) (the purchase price paid for the property by the defendant McGhee to defendant Huffman) as follows: first, plaintiffs must satisfy the mortgage on said property held by Regions Bank and recorded at rlpy 1990 page 0326 in the Office of the Judge of Probate of Montgomery County, Alabama; and, second, any amount of the Thirty Thousand Dollars ($30,000.00) which remains in excess of the amount owed under the mortgage shall be paid to defendant Orange McGhee.

The Court, having determined the transactions between defendants Henry Huffman and Orange McGhee are null and void, hereby dismisses with prejudice. Each party is to bear their own costs.

DONE the 20th day of June, 2000.

/s/ _____
CIRCUIT JUDGE

STATE OF ALABAMA -- JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 2000 - 2001

1991914

Orange McGhee v. Joseph T. Tisdale and Emily Tisdale
Appeal from Montgomery County (CV-99-1307)

STUART, Justice.

AFFIRMED. NO OPINION.

See Rule 53(a) (1) and (a) (2) (F), Ala. R. App. P.

Moore, C.J., and See, Brown, and Harwood, JJ., concur.

App. 6

THE SUPREME COURT OF ALABAMA

August 31, 2001

1991914

Orange McGhee v. Joseph T. Tisdale and Emily Tisdale (Montgomery Circuit Court Number: CV-99-1307)

ORDER

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

STUART, J. - Moore, C.J., and See, Brown, and Harwood, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 31st day of August, 2001

/s/ _____
Clerk, Supreme Court of Alabama

App. 7

IN THE SUPREME COURT OF ALABAMA
June 22, 2001

1991914

Orange McGhee v. Joseph T. Tisdale and Emily Tisdale (Montgomery Cir. Ct. No.: CV-99-1307)

CERTIFICATE OF JUDGEMENT
of Affirmance

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the court below is affirmed.

IT IS FURTHER ORDERED that the costs of appeal be taxed against the appellant as provided by Rule 35, Alabama Rules of Appellate Procedure.

NO OPINION BY STUART, J.
Moore, C..J., and See, Brown, and Harwood, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 18th day of Sept, 2001

/s/ _____
Clerk, Supreme Court of Alabama

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment XIV to the Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code 1982:

All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, leave, sell, hold and convey real and personal property.

42 United States Code 3601: Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

42 United States Code 3603 (b); Exemptions

Nothing in section 3604 of this title (other than

subsection (c)) shall apply to -

(1) any single-family house sold or rented by an owner: Provided, That such private individual owner does not own more than three such single-family houses at any one time : Provided further , That in the case of the sale of any such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: Provided further, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: Provided further, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

(c) Business of selling or renting dwellings defined.

For the purposes of subsection (b) of this section, a person shall be deemed to be in the business of selling or renting dwellings if -

(1) he has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or

(2) he has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or

(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

42 USC 3604: Discrimination in the Sale or rental of housing and other prohibited practices.

As made applicable by section 3603 of this title and except as exempted by section 3603(b) and 3607 of this title, it shall be unlawful -

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin

that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin...

App. 13

IN THE SUPREME COURT OF ALABAMA
CASE NO. 1991914
ORANGE MCGHEE,
APPELLANT

V.

JOSEPH T. TISDALE AND
EMILY TISDALE,

APPELLEES

****

ON APPEAL FROM THE CIRCUIT
COURT OF MONTGOMERY COUNTY

****

BRIEF OF APPELLANT

****

JAMES E. WILSON, JR.
732 CARTER HILL ROAD
MONTGOMERY, AL 36106
(334) 834-9899
ATTORNEY FOR APPELLANT

STATEMENT OF ISSUE

WHETHER THE ORDER OF THE COURT RENDERING THE WARRANTY DEED FROM DEFENDANT HUFFMAN TO DEFENDANT MCGHEE NULL AND VOID, DENIED MCGHEE DUE PROCESS OF LAW AND RENDERED THE ORDER VOID.

ARGUMENT

THE ORDER OF THE COURT RENDERING THE WARRANTY DEED FROM DEFENDANT HUFFMAN TO DEFENDANT MCGHEE NULL AND VOID, DENIED MCGHEE DUE PROCESS OF LAW AND RENDERS THE ORDER VOID.

Plaintiffs alleged in their complaint, inter-alia, that defendants Huffman and McGhee conspired together to deprive them of rights afforded them under 42 USC 3601 et. seq., and of equal protection under the law under 42 USC 1982. McGhee filed a Motion To Dismiss asserting, inter-alia, Plaintiffs First Cause of Action fails to state a claim against McGhee upon which relief can be granted on the ground, McGhee was not the owner or person with the authority to negotiate or sell real property and cannot be charged with a violation of 42 USC 3601 et seq.; with regard to Plaintiffs' Second Cause of Action (conspiracy), the subject property is not a dwelling as defined under 42 USC 3602(b); with regard to Plaintiffs' Third Cause of Action, (42 USC 1982) McGhee was

not the owner of the subject property and therefore cannot be charged with violating 42 USC 1982. The court denied the Motion To Dismiss and McGhee filed and Answer generally denying the allegations in Plaintiffs' Complaint. Huffman failed to answer or otherwise plead to Plaintiffs' Complaint. Plaintiffs thereafter, filed a Motion For Default judgement against Huffman and the court entered same.

Plaintiffs filed a Motion For Final Judgement And for An Order Directing Specific Performance, wherein, plaintiffs argue, the default judgement entered against Huffman eliminates the need for the court to determine whether McGhee is guilty of violating 42 USC 3601 et seq. and 42 USC 1982. The court agreed with plaintiffs' argument and entered an Order rendering the "Warranty Deed effectuating a transfer of property from defendant Henry Huffman to Orange McGhee and Lula Mae McGhee dated the 4th of May 1999, null and void; and further determined the transaction between defendants Henry Huffman and Orange McGhee null and void.

The court's order appears to be grounded in the default judgement entered against Huffman. Plaintiffs' Complaint clearly alleges multiple claims against multiple parties. The Order fails to dispose of the claims against McGhee and therefore is not a final judgement pursuant to Rule 54(b) of the Alabama Rules of Civil Procedure. Rule 54 provides, inter-alia, "that any order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the Order is subject to revision at any time before the entry of

judgement adjudicating all the claims and the rights and liabilities of all the parties."

"The significance of a judgement against less than all the parties is that the judgement does "not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgement adjudicating all the claims and the rights and liabilities of all the parties." Rule 54(b), Alabama Rules of Civil Procedure. (Emphasis added) A judgement by default, rendered in advance against one of several defendants is interlocutory until final disposition is made as to all the defendants." *Hallman v. Marion Corp.*, 411 So. 2d 130, 132.

Rule 54(b) further provides, "a judgement entered against less than all the parties may become a final judgement only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgement." The Order of the court fails to express the type order or judgement; fails to express there is no just reason for delay; and fails to express that a judgement should be entered. "When more than one claim for relief is presented in an action, an order entered upon less than all of the claims is not a final appealable order unless the judge makes an express determination that there is no just reason for delay pursuant to Rule 54(b) ARCP. Where the trial judge did not make express determination that there was no just reason for delay

judgement appealed from was not final order, and appeal was dismissed." Goza v. Everett, 365 So. 2d 659.

It is important that there is a proper construction of the court's order. The Order fails to give an express determination of the type order. Procedurally, the Order was entered subsequent to the court's entry of default judgement and Plaintiffs' Motion For Final Judgement And For Order Directing Specific Performance. The court states in the order, that it is granting Plaintiffs' Motion. The proper construction is, the Order is an Order on default judgement..

Plaintiffs argue in their Motion, that under Plaintiffs' Federal claims for relief, it is not necessary for McGhee to be found guilty of a discriminatory intent or even be a party to this litigation before the court can Order Huffman to specifically perform the alleged contract with Plaintiffs. Plaintiffs further argue that "the Court must find in Order to grant specific performance, that (1) liability be established against Huffman (it has been through the default judgement); and (2) that McGhee had actual Notice of the lawsuit before the sale of the realty was consummated (this is undisputed)." Clearly the court's Order is an effort to provide a remedy for the default judgement. Any remedy against a defaulting party must await the adjudication of all claims against all parties. Indeed, the court after adjudicating all claims may in its discretion, withdraw the default judgement and enter a judgement and order consistent with the facts and law presented. See Hallman v. Marion Corp., supra.

McGhee argues, that had he been allowed to defend plaintiffs' action, the facts and law would establish, the trial

court lacks subject matter jurisdiction to entertain the case. Plaintiffs seek relief pursuant to 42 USC 3601 et seq. (the Fair Housing Act of 1968) which prohibits discrimination in the housing market based on race, color, religion or national origin private as well as public in the sale and rental of property. 42 USC 3603(b) (1) provides for exemptions to the act for an owner who does not own more than three single family houses at any one time for sale or rent. Huffman submitted an Affidavit that he had never owned more than three such single family houses at any one time. The case law has held, that a court lacks subject matter jurisdiction to enter a case brought under the Fair Housing Act where the owner does not own more than three single family houses for sale or rent. *Hogar Agua Y Vida En El Desierte v. Suarez*, 829 F. Supp 19.

CONCLUSION

The Order of the court fails to meet the requirements of a final Order under Rule 54(b) of the Alabama Rules of Civil Procedure. The Order fails to dispose of all the claims against all parties and is therefore interlocutory. The court failed to expressly determine that there was no reason for delay and does not expressly direct the entry of a judgement. The Order attempts to provide a remedy for the default judgement entered against Defendant Huffman, however, fails to afford McGhee due process of law. The Order is therefore void. Wherefore Defendant McGhee respectfully request the court to find the order of the trial court void and direct the trial court to adjudicate Plaintiffs claims against McGhee and afford

McGhee due process of law and such other, further and different relief of the court deems just and proper.

Respectfully submitted,

/s/ _____
James E. Wilson, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing upon C. William Daniels, Jr. Esq., P.O. Box 16046, Mobile, Alabama, 36616, by placing a copy of the same in the United States Mail, first class postage prepaid this 30th day of August, 2000

/s/ _____
James E. Wilson, Jr.

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

JOSEPH T. AND EMILY TISDALE,	)	
Plaintiffs	)	
vs.	)	CASE NO. CV-1999-1307
HENRY HUFFMAN AND ORANGE MCGHEE,	)	
Defendants.	)	

COMPLAINT

Come now the plaintiffs, Joseph T. and Emily Tisdale, and for their complaint in this matter state as follows:

1. Plaintiffs, Joseph T. and Emily Tisdale are Caucasian, adult residents of Montgomery County, Alabama.

2. Henry Huffman is a black, adult resident of Montgomery County, Alabama and is the owner of 30 acres of property located in southern Montgomery County, Alabama.

3. Defendant, Orange McGhee, is a black, adult resident of Montgomery County, Alabama

FIRST CAUSE OF ACTION

4. On or about the first week of March, 1999, plaintiffs, Joseph T. and Emily Tisdale, learned of the subject premises being offered for sale and informed Henry Huffman that they desired to purchase that land. Defendant Henry Huffman orally agreed to sell them the land at issue.

5. Subsequent to this occasion, defendant Henry Huffman refused to consummate of the property and did so because of the plaintiffs' race (white). Instead, defendant Henry Huffman sold the land to defendant Orange McGhee.

6. Defendant's conduct in refusing to sale the land to plaintiffs because of their race was unlawful and is a violation of 42 U.S.C. § 3601, et. seq.

WHEREFORE, plaintiffs request of the defendants compensatory and punitive damages and further request this Court to enter an order granting specific performance and force the defendants to sell this property to the plaintiffs, along with court costs, reasonable attorneys' fees and whatever other relief plaintiffs might be entitled.

SECOND CAUSE OF ACTION
Conspiracy

7. Plaintiffs adopt and reallege paragraph 1 through 6 as if set out more fully herein.

8. Defendants Henry Huffman and Orange McGhee conspired together to deprive the plaintiffs of their civil

rights by agreeing to deprive the plaintiffs of the sale of the subject property in violation of 42 U.S.C.§ 3601, et. seq.

WHEREFOR, plaintiffs request of the defendants compensatory and punitive damages and further request this Court to enter an order granting specific performance and force the defendants to sell this property to the plaintiffs, along with court costs, reasonable attorneys' fees and whatever other relief plaintiffs might be entitled.

THIRD CAUSE OF ACTION

9. Plaintiffs adopt and reallege paragraph 1 through 8 as if set out more fully herein.

10. The defendants' actions have deprived the plaintiffs of equal protection under the law and constitutes a violation of 42 U.S.C. § 1982.

WHEREFORE, plaintiffs request of the defendants compensatory and punitive damages and further request this Court to enter an order granting specific performance and force the defendants to sell this property to the plaintiffs, along with court costs, reasonable attorneys' fees and whatever other relief plaintiffs might be entitled.

Respectfully Submitted,

/s/ _____

BILL DANIELS

Attorney for Plaintiffs

PLAINTIFFS HEREBY RESPECTFULLY DEMAND A TRIAL BY JURY.

/s/ _____
BILL DANIELS
Attorney for Plaintiffs

OF COUNSEL:
PIERCE, LEDYARD, LATTA & WASDEN
Post Office Box 16046
Mobile, AL 36616
(334) 344-5151

DEFENDANTS TO BE SERVED BY CERTIFIED MAIL:

Henry Huffman
1000 Mobile Street
Montgomery, AL 36108

Orange McGhee
1521 Sanford
Montgomery, AL 36106